ration of thyroid, but its label failed to bear a statement of the quantity or proportion of the preparation of thyroid.

DISPOSITION: May 10, 1945. A plea of guilty having been entered on behalf of the defendant, the court imposed a fine of $200 on each count, a total fine of $400.

1583. Misbranding of Contour-Molde "Face Lifting" Bandage. U. S. v. Eunice Skelly (Eunice Skelly House of Youth). Plea of guilty. Fine, $300 and 6 months' suspended jail sentence. Defendant placed on probation for 6 months. (F. D. C. No. 11349. Sample No. 2273–F.)

INFORMATION FILED: August 4, 1944, Southern District of New York, against Eunice Skelly, trading as Eunice Skelly and the Eunice Skelly House of Youth, New York, N. Y.

ALLEGED SHIPMENT: On or about November 27, 1942, from the State of New York into the State of Illinois.

PRODUCT: A device known as the *Contour-Molde "Face Lifting" Bandage*, which was a part of a so-called "Deluxe Rejuvenating Kit" which contained various cosmetic preparations to be used in conjunction with the device.

The device was a strip of flesh-colored, elastic-weave cloth 17 inches long and 4 inches wide and stretching lengthwise only. Shipped with the device were certain circulars entitled "The Eunice Skelly Contour Molde," "Eunice Skelly presents her," and "Eunice Skelly's Brochure."

NATURE OF CHARGE: Misbranding, Section 502 (a), certain statements in the circulars were false and misleading since they represented and suggested that the device would be efficacious to lift the face, restore youthful contours to the face, and produce a passive massage action which would stimulate and support the muscles and thereby help prevent sagginess of the muscles; that it would be efficacious to prevent and overcome sagging muscles, double chin, crepy throat and crepy neck; and that it would be efficacious to rejuvenate one physically and mentally. The article would not be efficacious for the purposes recommended and suggested.

The information also alleged that certain cosmetics which were to be used in conjunction with the device were misbranded under the provisions of the law relating to cosmetics, as reported in notices of judgment on cosmetics, No. 122.

DISPOSITION: August 10, 1944. A plea of guilty having been entered, the defendant was fined $300 and sentenced to 6 months' imprisonment. The jail sentence was suspended and the defendant was placed on probation for 6 months.

1584. Misbranding of Boncquet Tablets. U. S. v. 1 Dozen Bottles and 9 9/12 Dozen Bottles of Boncquet Tablets. Tried to the court. Case dismissed on motion. Appeal taken to United States Circuit Court of Appeals. Reversed and remanded. Consent decree of condemnation and destruction. (F. D. C. No. 8086. Sample Nos. 24605–F, 24606–F.)

LIBEL FILED: August 10, 1942, District of Maryland; libel amended September 10, 1942, to cover seizure of additional lot of 2 9/12 dozen bottles.

ALLEGED SHIPMENT: On or about April 1 and May 8, 1942, by the Boncquet Laboratories, from Glendale, Calif.

PRODUCT: 3 9/12 dozen 400-tablet bottles and 9 9/12 dozen 150-tablet bottles of *Boncquet Tablets* at Baltimore, Md. Accompanying the product were a number of booklets entitled "Adds New Fighting Blood in 9 days." They had been shipped sometime prior to the shipment of the product.

Microscopic examination indicated that the product consisted essentially of dried brewer's yeast, milk sugar, dried leafy plant material, and approximately 1 grain of mineral matter per tablet.

NATURE OF CHARGE: Misbranding, Section 502 (a), the following statements appearing in the labeling of the article were false and misleading in that they implied that the article, when taken as directed, would be a consequential supplement to the ordinary diet with respect to the minerals, fat, protein, carbohydrate, and caloric content, whereas it would not be a consequential adjunct to the diet with respect to those nutritional requirements: "Nutritional Data For Physicians And Dietitians Moisture . . . 10.11% Ash (Mineral Matter) . . . 10.81% Fat (Ether Extract) . . . 2.91% Protein (N x 6.25) . . . 33.25% Crude Fiber . . . 4.84% Carbohydrates other than crude fiber (by difference) . . . 38.08% Calories per pound . . . 1414 Total Alkalinity of Ash . . . 193 (No. of c.c. of 0.1 Normal acid required to neutralize the ash from

100 grams of Sample) * * * Mineral Analysis Calcium (Ca) 2.12% Magnesium (Mg) 0.18% Sodium (Na) 0.68% Phosphorous (P) 1.24% Manganese (Mn) 0.0035% Potassium (K) 4.08% Iron (Fe) 0.012% Copper (Cu) 0.0038% Chloride (Cl) 1.17% Iodine (I) Trace Sulfur (S) 0.40%."

Further misbranding, Section 502 (a), certain statements, designs, and devices appearing in the labeling were false and misleading since they suggested and engendered the idea in the mind of the reader that the article, when taken as directed, would prevent or correct abnormalities of the blood and thereby prevent or correct all disease conditions and specifically such conditions as rheumatic twinges, constipation, poor complexion, frequent headaches, numerous colds, dizziness, lack of appetite, tired feeling, loss of strength, pimples, boils, sallow complexion, poor skin, foul breath, heart palpitation, fatigue, despondency, listlessness, nervousness, anemia, pernicious anemia, and secondary anemia. The article would not prevent or correct abnormalities of the blood and thereby prevent or correct such disease conditions.

DISPOSITION: On October 14, 1942, J. Paul Elliott, receiver of Boncquet Laboratories, claimant, filed his claim and answer denying the allegations of misbranding. He also filed a motion to remove the case to the United States District Court for the Southern District of California. Thereafter, an answer to the claimant's motion was filed on behalf of the Government, alleging that there was no right of removal of the case to another district since a prior judgment in favor of the United States had been entered against Boncquet Tablets, based upon the same misbranding as that involved in the instant case. The claimant filed exceptions to the Government's answer and, after consideration of the evidence and arguments of counsel in the matter, the court, on January 22, 1943, entered an order denying the claimant's motion for removal.

On March 13, 1944, the district court ordered the libel dismissed with the following opinion:

COLEMAN, *District Judge:* "The Court having duly considered the motion of the claimant herein, J. Paul Elliott, Receiver of Boncquet Laboratories, to dismiss the amended libel against the articles, labels, circulars or pamphlets seized and described in the amended libel filed herein on the tenth day of September, 1942; and having also fully considered the answer of the Government to said motion of claimant, the Court is of the opinion that said motion should be granted for the following reasons: (1) The issues described in the amended libel forming the basis of this proceeding have, for all practical purposes, become moot in that the label appearing upon the bottles of the material seized, and also in that the accompanying circulars or pamphlets, have long ago been changed; and none of said material so labeled or said circulars or pamphlets have been distributed for more than two years, namely, since the twenty-eighth day of February, 1942; (2) the receiver of Boncquet Laboratories, claimant herein, has given assurances, under oath, to this Court, in his affidavit annexed to his motion to dismiss the amended libel herein, that hereafter no product of Boncquet Laboratories will be distributed under the former alleged objectionable label or formula and that no circulars or pamphlets will hereafter be issued of the alleged objectionable type; and (3) the receiver of Boncquet Laboratories, claimant in this proceeding, has received approval from the Superior Court for the State of California, in and for the County of Los Angeles, that being the Court wherein said receiver and claimant herein, received his appointment, for the use of a new label and future manufacture of the product of the Boncquet Laboratories under a changed formula and is under requirement of said Court to cease and desist from the use or distribution of the label, circulars or pamphlets or formula which are the subject matter of this present libel proceeding; and (4) prior to the hearing upon the merits conducted by the Court in this libel proceeding, all dealers in the alleged objectionable product of Boncquet Laboratories had been directed by said receiver of Boncquet Laboratories, to destroy any unused circulars or pamphlets of the alleged objectionable type described in the libel in this proceeding.

"In addition to the foregoing reasons for dismissing the amended libel, the Court is of the opinion that the long pending action by the Federal Trade Commission against Boncquet Laboratories, the institution of which action antedates the institution of the present proceeding, involves, for all practical purposes, the same issues that are involved in the present libel proceeding; that the representatives of the Government in the present libel proceeding have been unable to give to this Court any definite estimate as to when said action

by the Federal Trade Commission may be concluded; that presumably a decision in said action will ultimately be rendered and that to proceed with the present libel proceeding, under all of the circumstances, would thus appear to be duplicitous, costly and unnecessary.

"For the above reasons, an order will be signed herein granting the claimant's motion to dismiss the amended libel."

The Government perfected an appeal to the United States Circuit Court of Appeals for the Fourth Circuit, and the case was set for hearing and argued by counsel on November 13, 1944.

On December 13, 1944, the United States Circuit Court of Appeals handed down its decision reversing the judgment of the district court in dismissing the libel and remanding the case for further proceedings with the following opinion:

SOPER, *Circuit Judge:* "The United States filed a libel for the seizure and condemnation of a quantity of drugs called Boncquet tablets, which had been shipped in interstate commerce from Glendale, California, to Baltimore, Maryland, on the ground that the goods were misbranded within the meaning of the Federal Food, Drug, and Cosmetic Act of June 25, 1938, 21 U. S. C. A. § 301 et seq. The goods were attached and J. Paul Elliott, receiver of Boncquet Laboratories, by appointment of the Superior Court of Los Angeles County, California, filed an answer as claimant and prayed that the libel be dismissed.

"When the case came on for hearing, it was shown that the misbranding complained of appeared in certain descriptive circulars which were shipped separately from the goods and designed to be used by dealers in connection with the resale of the goods. In this instance the accused circulars had been shipped before the goods and the shipment of circulars of this kind had been discontinued before the shipment by the manufacturer of the attached goods; but the dealers, to whom the circulars and the goods had been sent, were not notified to withdraw the circulars until after the goods had been received and put on sale in Baltimore. Specifically the distribution of the circulars was discontinued on February 28, 1942. The goods were shipped in April and May, 1942, when the circulars were still in possession of the dealers, and the direction from the shipper to the dealers to destroy the circulars was not issued until August, 1942.

"Upon this set of facts the District Judge, before determining whether or not the circulars misdescribed the goods, ruled preliminarily that the circulars accompanied the goods within the meaning of § 321 (m) of the Act, so as to constitute a misbranding with the meaning of § 331 (b) of the Act, if in fact the circulars falsely described the goods. For decisions bearing on this subject see, United States v. Research Laboratories, 9 Cir., 126 F. 2d 42, 45; certiorari denied 317 U. S. 656, 63 S. Ct. 54, 87 L. Ed. 528; United States v. Lee, 7 Cir., 131 F. 2d 464, 466; United States v. 7 Jugs, etc., Dr. Salsbury's Rakos, D. C. Minn., 53 F. Supp. 746, 755.

"It was then brought to the attention of the court by attorneys for the claimant that a proceeding against the shipper of the goods, based upon similar misdescription of goods shipped in interstate commerce, had been instituted before the Federal Trade Commission prior to the filing of the libel in this case and was still pending. The court thereupon postponed the hearing of the libel so that it might be definitely ascertained whether the Federal Trade Commission intended to proceed with the case before it or to abandon it, with leave to the United States in the latter event or in the event that the same issues were not involved in the two proceedings, to move to put the libel case back on the trial docket of the District Court.

"Subsequently, the receiver and claimant of the goods filed a motion in the instant case supported by affidavit to dismiss the libel on the two grounds that the same issues were still pending before the Federal Trade Commission and that the instant case had become moot because after the libel was filed, the formula of the goods had been revised and the distribution of the circulars complained of had been discontinued. The court granted this motion and dismissed the case for the reasons and upon the findings of fact set out in an accompanying opinion. Therein the court held (1) that the issues in the libel case had become moot in that the label on the bottles and the accompanying circulars had been changed by the claimant and none of the drug so labelled or the accused circulars had been distributed for more than two years; (2) that the claimant had given assurances that there would be no further shipment of goods accompanied by the labels or circulars objected to; (3) that the claimant had obtained the approval of the California court for the use of a new label and the

manufacture of the goods under a changed formula, and had been ordered by that court to cease and desist from the distribution of the prior labels and circulars; (4) that all dealers had been directed to destroy the accused circulars and pamphlets, and (5) that for all practical purposes the same issues were involved in the pending action before the Federal Trade Commission so that to proceed with the libel case under the circumstances appeared to be duplicitous, costly and unnecessary.

"[1, 2] No copy of the complaint or of the answer or of the testimony taken in the proceeding before the Federal Trade Commission was introduced in evidence in the pending case, and the court's conclusion was based upon the general statement of counsel for the opposing parties that essentially the same issues were involved in both cases. In the absence of more definite proof, we shall assume that the jurisdiction of the Commission was invoked under the Federal Trade Commission statute, 15 U. S. C. A. §§ 45, 52, and 53, to enjoin the shipper of the drugs from using unfair or deceptive acts or practices and from disseminating false advertisements to induce the purchase of the drugs in interstate commerce. Obviously there is no necessary conflict between such a proceeding, which is designed to prevent the continuance in the future of unfair and deceptive trade practices, and a libel under the Federal Food, Drug, and Cosmetic Act which invokes the power of the court to seize and condemn falsely branded goods which have been unlawfully shipped in interstate commerce in the past. The relief sought in the libel suit, that is, the condemnation of the offending shipment could not have been granted by the Federal Trade Commission, and consequently it cannot be said that the court was clothed with that discretionary power to refuse to entertain jurisdiction which a court has when a prior action between the same parties involving the same issue has been filed in another court which has the power to adjudicate all the rights of the parties. There was no occasion for the application of the principle that the pendency of a prior action or suit, predicated on the same cause of action between the same parties, constitutes good ground for the abatement of a later action or suit. See Maryland Casualty Co. v. Boyle Construction Co., Inc., 4 Cir., 123 F. 2d 558, 564. It has been correctly held that the power of the District Court to condemn misbranded articles is not impaired or affected by the power of the Federal Trade Commission to issue a cease and desist order against the shipper in a proceeding pending before it. United States v. Research Laboratories, Inc., 9 Cir., 126 F. 2d 42, 45; Sekov Corporation v. United States, 5 Cir., 139 F. 2d 197.

"[3, 4] It is true that a decision of a court favorable to the manufacturer in a libel proceeding brought by the United States for the condemnation of goods alleged to have been misbranded is a bar to the promulgation of a cease and desist order by the Federal Trade Commission in a proceeding based on the same charge of misrepresentation of the character of goods shipped in interstate commerce; George H. Lee Co. v. Federal Trade Commission, 8 Cir., 113 F. 2d 583; and conversely it has been held that a libel to condemn goods alleged to have been misbranded under the Federal Food, Drug, and Cosmetic Act cannot be sustained if the Federal Trade Commission in a prior proceeding has found that the statements made by the shipper in respect to the goods were not false or misleading. United States v. Willard Tablet Co., 7 Cir., 141 F. 2d 141. But there has been no determination by the Federal Trade Commission of the issues raised in the pending case. Indeed there is no definite showing of the precise status of the proceeding before the Commission. All we know is that a complaint was filed on December 8, 1938, some testimony was taken in California in September, 1942, and some effort has been subsequently made by the judge of the California court and by the claimant-receiver to induce the Federal Trade Commission not to issue a cease and desist order because the formula of the goods and the advertising matter relating thereto have been changed, and the shipper has directed the dealers to destroy all the old circulars on hand. What course the Federal Trade Commission will pursue in the future no one undertakes to say. For all that we know, the proceeding before that body may be abandoned or dismissed without further action. It seems clear that the claimant seeks the dismissal of the pending libel suit on the ground that the proceeding before the Federal Trade Commission involves the same issues and at the same time is seeking the dismissal of the latter proceeding on the ground that prior practices alleged to have been deceptive have been abandoned.

"[5] What has been said is a sufficient answer to the suggestion that the pending case is moot because the offending circulars have been withdrawn and

destroyed and the claimant has given the court assurance of good behavior in the future. Such a promise does not relieve the goods from liability for past actions and the case is not moot so long as the demand of the United States for condemnation of the goods remains unheard. Under the circumstances, we think that the trial court was not clothed with discretion or authority to decline jurisdiction. It should proceed to hear and determine the charges contained in the libel upon the merits since the right of a party litigant to the judgment of a court upon a matter properly before it is a fundamental aim of the law. Cohen v. Virginia, 6 Wheaton 264, 404, 5 L. Ed. 256, 257; Willcox v. Consolidated Gas Co., 212 U. S. 19, 40, 29 S. Ct. 192, 53 L. Ed. 382, 48 L. R. A., N. S., 1134, 15 Ann. Cas. 1034; McClellan v. Carland, 217 U. S. 268, 282, 30 S. Ct. 501, 54 L. Ed. 762; 35 Am. Jur. (Mandamus) § 254, p. 25.

"The judgment of the District Court is reversed and the case remanded for further proceedings.

"Reversed."

Thereafter, on September 12, 1945, claimant having joined in requesting entry of a decree, judgment of condemnation was entered and the product was ordered destroyed.

1585. Misbranding of Boncquet Tablets. U. S. v. 83 Bottles and 103 Bottles of Boncquet Tablets, and a quantity of printed matter. Default decree of condemnation and destruction. (F. D. No. 3677. Sample Nos. 26587–E, 26588–E.)

LIBEL FILED: January 21, 1941, Western District of Washington.

ALLEGED SHIPMENT: Between the approximate dates of July 15 and November 6, 1940, by the Boncquet Laboratories, from Glendale, Calif.

PRODUCT: 83 400-tablet bottles and 103 150-tablet bottles of *Boncquet Tablets* at Seattle, Wash., together with a number of circulars entitled "Adds New Fighting Blood in 9 Days" and a number of placards and display cards.

Analysis showed that the product consisted essentially of yeast, milk sugar, salt, and desiccated green leaf and stem plant material, containing total iron 0.01 grain, total calcium calculated as calcium oxide 0.09 grain, total phosphorus calculated as phosphorus pentoxide 0.19 grain, and protein approximately 3 grains per tablet.

NATURE OF CHARGE: Misbranding, Section 502 (a), because of false and misleading curative and therapeutic claims in the labeling, substantially the same as those contained in the labeling of the same product reported in notices of judgment on drugs and devices, No. 1584.

Further misbranding, Section 502 (a), certain designs and statements in the labeling were false and misleading since they represented and suggested that the article contained the active principles of raw liver, vegetable iron, vitamin B complex, fortified with pure crystalline B and G, and assimilable calcium and phosphorus in therapeutically significant amounts. The article did not contain the ingredients mentioned in therapeutically significant amounts. Further misbranding, Section 502 (e) (2), the label of the article failed to bear the common or usual name of each active ingredient.

DISPOSITION: On March 27, 1941, Boncquet Laboratories having appeared as claimant, and stipulation having been entered between the United States attorney and the claimant for change of venue, the case was ordered transferred to the Northern District of California. On April 4, 1942, the case having been called and the claimant having failed to appear, judgment of condemnation was entered and the product was ordered destroyed.

1586. Misbranding of "666." U. S. v. 79 Dozen Bottles of "666" (and 10 other seizure actions against "666"). Decrees of condemnation and destruction. (F. D. C. Nos. 13086 to 13089, incl., 13801, 14650, 14664, 14665, 14849, 14862, 14863, 15280, 15724, 15804. Sample Nos. 72889–F to 72892–F, incl., 72896–F, 90145–F to 90148–F, incl., 90150–F, 90164–F to 90166–F, incl., 20312–H, 22320–H, 22321–H, 23814–H.)

LIBELS FILED: Between the approximate dates of July 31, 1944, and April 7, 1945, Northern Districts of Texas and California, Western District of Arkansas, Eastern District of Oklahoma, and District of Kansas.

ALLEGED SHIPMENT: Between the approximate dates of November 9, 1942, and May 29, 1944, by the Monticello Drug Co., from New Orleans, La.

PRODUCT: 324½ dozen bottles of "666," bottled in 3-ounce and 6-ounce containers and located at Dallas, Tex., San Francisco, Calif., Texarkana, Ark., Hot Springs, Ark., Nashville, Ark., Muskogee, Okla., Rogers, Ark., and Wichita, Kans.